

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

76-6171

DOCKET NO.
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NA POLEON RICHARDSON and FRANCISCO
CHAIMOWICZ, as Executors of the
Estate of CONCEPCION BRODERMANN
STUETZEL, also known as CONCEPCION
BRODERMANN,

Plaintiffs-
Appellants,

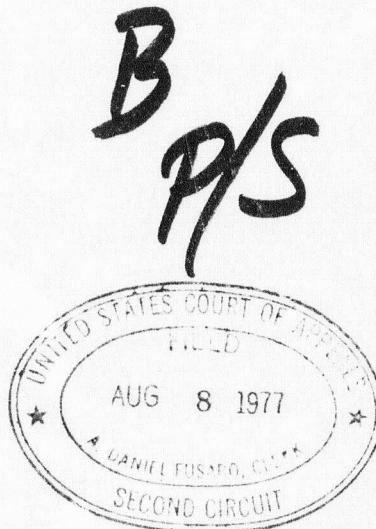
against

WILLIAM E. SIMON, as Secretary of
the Treasury of the United States,
and the BANK OF NOVA SCOTIA,

Defendants-
respondents.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN
BANC



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PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Plaintiffs-appellants do hereby respectfully petition for
rehearing with suggestion for hearing in banc.

The panel of judges (Honorable Leonard P. Moore, J. Joseph Smith and William H. Mulligan) which heard this appeal affirmed by a two to one vote. Judges Smith and Mulligan voted to affirm in an opinion by Judge Smith. Judge Moore in a dissenting opinion voted to reverse.

The importance of this appeal lies in the constitutional question raised by the issues involved and the equities and the pursuit of justice in the interpretation of the Regulations promulgated and enforced by the Treasury Department.

STATEMENT OF FACTS

Carl Stuetzel and his wife, Concepcion lived in Cuba from the date of their marriage on September 15, 1906. During their marriage they placed cash and securities with the New York branch of the Bank of Nova Scotia. The affidavit of the attorney for the bank states that it was a joint account in the names of Carl Stuetzel and/or Concepcion Brodermann, also known as Concepcion Brodermann Stuetzel, payable to either or to the survivor upon the death of either.

On July 8, 1963 the assets of Cuban nationals were frozen. Carl Stuetzel died intestate in Cuba on August 24, 1965. They had no children. Concepcion was his sole heir. Under Cuban and New York law, she became the owner of all the assets placed

with the Bank of Nova Scotia.

On October 13, 1969 Mrs Stuetzel entered the United States as a permanent resident. On November 4, 1969 she applied to the Treasury Department for a license releasing the blocked assets in the possession of the Bank of Nova Scotia. A license was granted as to only fifty per cent of the blocked assets.

On October 31, 1971 Mrs Stuetzel died in the Nassau County Medical Center, East Meadow, New York, a permanent resident of Nassau County. Her Will was admitted to probate by the Surrogate's Court of Nassau County. Plaintiffs were appointed executors in accordance with provisions of her Will. The Will also provides that her niece, Elena Richardson, is to receive the residuary estate which consist of the cash and securities held by the Bank of Nova Scotia.

The plaintiffs and Elena Richardson are citizens of the United States and reside in Nassau County.

ARGUMENT

Section 5 (b) of the Trading with the Enemy Act refers to transactions involving any property in which any foreign country or a national thereof has any interest (Emphasis supplied) as being prohibited.

With this language of the Act in mind, the Cuban Assets Control Regulations provide that the following are licensed as unblocked nationals:

Section 515.505 - "(1) Any individual resident in and within the United States except an individual who on or after the "effective date has acted or purported to act directly or indirectly for the benefit of or on behalf of a designated country."

Section 515.507- "(a) Any individual who is a citizen of the United States, residing only in the United States .. "

Mrs Stuetzel, the plaintiffs and Elena Richardson the residuary legatee come under these sections.

The payment of the 50% of the blocked assets to Mrs. Stuetzel is an indication that she was entitled to 100%. It is noteworthy that Judge Smith says at the bottom of page 4943 of the printed opinion: " The government does not explain, and we have difficulty in understanding, how 50 percent of the blocked assets promotes any of these three purposes of the Act"

The inconsistency of the Treasury Department in interpreting the Trading with the Enemy Act is truly puzzling. In the Real case 510 F2d 557 (5th Circuit, 1975) rehearing denied 514 F2d 738, the government admits the facts are practically identical with this case. Yet after the Circuit Court of Appeals denied rehearing, the Attorney General of the United States wrote to the Clerk of Fifth Circuit consenting to mandate of payment to the plaintiffs. The facts in this case being identical to those of Real, how can the government say to one plaintiff that you are right and then tell another identical plaintiff you are wrong?

Sardino v. Federal Reserve Bank 361 F2d 106 which is cited by the government has an important distinguishing fact. Sardino was a Cuban still residing in Cuba when he applied for the release of the blocked funds. Mrs Stuetzel was a permanent resident of the United States and the plaintiffs herein are American citizens residing in the United States. The Court in Sardino said:

" While the Government points out also that, despite the broad language of the Regulations, 515.201(a), the funds would be made available to Sardino if he sought refuge in this country as many of his fellow Cubans have done, see 49 Dept. of State Bull.160(1963), the record contains nothing to show any intention on his part to do this.

The due process clause speaks in terms not of taking but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life. Compare Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Goldblatt v. Town of Hemsead, 369 U.S. 590; ALI, Restatement of Foreign Relations Law, Section 197 (Proposed Official Draft 1962)"

Thus far Mrs. Stuetzel was prevented from having the use of the blocked assets and the ban has outrun her life. And who can say that it (the Treasury's ban) may not outrun the life of her niece, the beneficiary named in Mrs. Stuetzel's Will?

The government argues that Carl Stuetzel retained his interest in the blocked assets located in the New York branch of the Bank of Nova Scotia even after his death. This despite the fact that cash and securities on deposit with the bank were in the joint names of Carl and his wife, Concepcion, with the right of survivorship.

If he were alive and were able to join his wife in this country as a permanent resident, the government admits he and his wife would be entitled to have the funds released to him. But since he is dead, he took these assets with him to the grave, even though they are admittedly still in the physical possession of the bank under an agreement signed by both giving the survivor the right to them.

Such a determination, as a dead man retains an interest in his estate, is arbitrary and defies logic and has no basis in law, the Court of Appeals held in the Real case. The Attorney General of the United States consented to a mandate of payment after the application for rehearing was denied.

The facts in the Real case and this case have not changed.
there
Neither has/ been any change in the law by Congress or otherwise
which would justify the Government treating the plaintiffs in
this case any differently than they ultimately did in the
Real case.

The Trading with the Enemy Act basic concept was to
prevent any property in which any foreign country so designated
or national thereof has any interest to fall into its hands.
No claim has been made that any of the funds involved in this
case will fall into the hands of Cuba or any national thereof.

The Treasury , through its Cuban Assets Control Director,
by its interpretation of the Trading with the Enemy Act, is
attempting to change the well established laws of succession
so as to deprive an American citizen of her inheritance.
Such deprivation is a violation of the Fifth Amendmant to the
United States Constitution.

CONCLUSION

Plaintiffs-appellants respectfully urge that a rehearing
be granted and that the constitutional issues involved be
reviewed by this Court in banc.

August 8, 1977

Respectfully submitted,
Samuel Gursky
SAMUEL GURSKY
Attorney for Plaintiffs-
Appellants

Certificate of Counsel

I certify that I have examined the foregoing petition
and that in my opinion it is well-founded, and is presented in
good faith and nor for the purpose of delay.

Samuel Gursky
Samuel Gursky

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

SAMUEL GURSKY, being duly sworn, deposes and says:

That on the 8th day of August, 1977, I deposited in the Mail Drop of the Grand Central Post Office two copies of the petition for rehearing with the suggestion for a rehearing in banc, of which the annexed is a true copy, contained in a securely postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

David G. Trager, Esq.
United States Attorney, Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Sworn to before me this
8th day of August, 1977

Samuel Gursky
Samuel Gursky

Hyman Chupkin

HYMAN CHUPKIN
NOTARY PUBLIC, State of New York
No. 31-588960
Qualified in New York County
Commission Expires March 30, 1978